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No. 90-1806

In The

Supreme Court of the United States

October Term, 1990

PORT CLINTON ASSOCIATES,

Petitioner,

versus

BOARD OF SELECTMEN OF THE TOWN OF CLINTON,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Connecticut

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a claimant may premise a "taking" claim seeking "just compensation" against a municipal authority based upon the denial by the municipality of a single permit application.

PARTIES

Plaintiffs:

Port Clinton Associates
Port Clinton Marina, Inc.

Defendants:

Board of Selectmen of the Town of Clinton
Virginia D. Zawoy
Margery C. Scully
Patricia A. Swaun
Miguel A. Escalera
Edward A. Miller, III
Town of Clinton
The State of Connecticut
Leslie Carothers, Commissioner of Environmental Protection for the State of Connecticut

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STATEMENT OF THE CASE

In 1972, the respondent Town of Clinton enacted an ordinance entitled "An Ordinance Establishing Building Lines In Certain Clinton Waterways." This provision was enacted under the enabling authority of Section 7-147 of the Connecticut General Statutes. On December 10, 1985, the petitioner Port Clinton Marina, Inc. (hereinafter "Port Clinton") received a conditional permit from the Connecticut Department of Environmental Protection to construct an extension of the docks at its marina, which is located within the waters of Clinton Harbor and/or the Hammonasset River, further into the waterway. The permit was issued by the Connecticut Department of Environmental Protection, subject to any necessary local or federal permit requirements.

Port Clinton also sought approval for its project from the United States Army Corps of Engineers ("Corps of Engineers"), which is responsible for regulating navigable waters of the United States. The Corps of Engineers denied the application in accordance with the provisions of 33 C.F.R. § 20.4(j)(1) on the grounds that local approval from the respondent Board of Selectmen was required before the Corps of Engineers could approve construction because the scope of the requested permit encroached beyond the harbor building lines established under the above-referenced ordinance.

On or about April 14, 1986, Port Clinton applied to the respondent Board of Selectmen of the Town of Clinton for a permit to extend its docks. In accordance with the ordinance, the Board referred the application to the Clinton Harbor Commission, which recommended denial of

the application. A public hearing on the application was held on May 6, 1986, and on June 16, 1986, the Board of Selectmen issued a Memorandum of Decision denying the application.

In its Memorandum of Decision, the Board first noted the purposes and standards set forth in the ordinance, " 'conserving and preserving' the water resources of Clinton Harbor and other waterways." It then refused permission on the basis of "evidence indicating that the proposed expansion would have a negative impact on safety, both in the harbor and on shore and that it could cause harm to the environmental quality of the harbor and its water resources. Both the expansion of the docking facilities further out into the harbor and the resulting increase in intensity of on-shore activities could lead to further crowding, congestion, and pollution."

Port Clinton subsequently filed the instant lawsuit. At no time did Port Clinton submit a permit application for or otherwise seek approval from the Town for a revised or reconfigured proposal for dock construction.

Port Clinton began the present action as an administrative appeal from the Town's action, which appeal was provided for under the provisions of Connecticut General Statutes Section 7-147. After a series of amendments and revisions to the Complaint which added claims for a declaratory judgment that Connecticut General Statutes Section 7-147 is invalid and therefore void, and seeking money damages based upon the alleged taking of the plaintiffs' property rights without just compensation pursuant to the provisions of 42 U.S.C. § 1983, Port Clinton eventually withdrew its appeal under the provisions of

Connecticut General Statutes Section 7-147, apparently choosing to pursue the matter strictly as a "taking" claim seeking money damages as "just compensation."

Section 7-147, as it existed at the time of the enactment of the Town's Harbor Building Lines ordinance and at the time of inception of this lawsuit, was repealed and extensively rewritten by the Connecticut General Assembly in 1988. On May 4, 1988, the Town of Clinton advised both the Army Corps of Engineers and the plaintiffs of its withdrawal of any objection to the granting by the Army Corps of the permit requested by Port Clinton. On November 14, 1989, the Town of Clinton repealed the Harbor Building Lines Ordinance.

After the filing and argument of motions for summary judgment by both parties, the trial court dismissed Port Clinton's Complaint in its entirety on its own motion for lack of subject matter jurisdiction, holding that the counts seeking repeal of the ordinance in question and its enabling statute were moot and that Port Clinton's failure to pursue the available administrative appeal rendered the administrative act in question insufficiently "final" to enable the court to make any determination as to whether Port Clinton's property had been taken or whether just compensation for any such taking had been denied.

The Connecticut Supreme Court disagreed with the trial court that Port Clinton was required to pursue a statutory appeal before bringing its Section 1983 claim, but concluded that Port Clinton did not allege sufficient finality to support either its taking or its Section 1983 claim, holding that the denial of a single permit application, without more, does not fulfill the requirement that a

claimant show that "the initial decision-maker [had] arrived at a definitive position on the issue that inflict[ed] an actual, concrete injury . . . ," as established by this Court in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 193, 105 S.Ct. 3108, 87 L.Ed.2d 127 (1985). The dismissal was affirmed.

The petitioner then filed this "Petition for Writ of Certiorari."

REASON FOR DENIAL OF THE PETITION

Contrary to the petitioner's suggestion, this case does not present any important federal question which has not been settled by this Court. The decision of the Connecticut Supreme Court in this matter clearly comports with the well-established precedent of this Court to the effect that a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulation in question has reached a final decision regarding the application of the regulation to the property at issue. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 186, 105 S.Ct. 3108, 3116, 87 L.Ed.2d 126 (1985); *Penn Central Transportation Co. v. New York City*, 483 U.S. 104, 136-37, 98 S.Ct. 2665-66, 57 L.Ed.2d 631 (1978); *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980); *Hodel v. Virginia Surface Mining & Reclamation Assoc., Inc.*, 452 U.S. 264, 297, 101 S.Ct. 2352, 2371, 69 L.Ed.2d 1 (1981); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348-49, 106 S.Ct. 2561, 2566, 91 L.Ed.2d 285 (1986). This

"finality" prerequisite must be met whether the regulatory taking claim is premised on a "just compensation" theory or a "due process" theory. *Williamson County*, 473 U.S. at 199-200, 105 S.Ct. at 3123.

Port Clinton indisputably submitted only *one* proposal to the respondent Board of Selectmen. The decisions of this Court set forth above clearly establish that such a factual premise cannot possibly meet this Court's "finality" requirement in the sense of showing that "the initial decision-maker [had] arrived at a definitive position on the issue that inflict[ed] an actual concrete injury . . . . " *Williamson County*, 473 U.S. at 193.

The petitioner's attempt to characterize what is clearly and unquestionably a "takings" claim as a claim for impairment of procedural due process of the type recently addressed by this Court in *Zinermon v. Burch*, 494 U.S. ___, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990) should be recognized by this Court, as it was by the Connecticut Supreme Court, as adding nothing to the "taking" claim at issue in this matter. In addressing Port Clinton's argument that "the regulation *itself* was invalid and therefore that its 'adoption and application' to Port Clinton caused a temporary taking without regard to the extent of loss caused," the Connecticut Supreme Court correctly declined to recognize such a claim as a basis for discarding the finality requirement set forth by this Court in land use takings claims. *Port Clinton Assoc. v. Board of Selectmen*, 217 Conn. 588, 600-01 (1991) (emphasis in original).

The Connecticut Supreme Court reached its conclusion for two reasons. First, it recognized that Port Clinton

sought not only invalidation of the regulation, but compensation for its injury. "Until a trial court knows 'how far the regulation goes' it cannot determine the extent of the injury, or, indeed, be certain that there is any injury not *de minimis* in scope." *Id.* at 601. Secondly, the Connecticut Supreme Court recognized that:

> [I]n contending that the ordinance itself constituted a "per se" taking, Port Clinton did not charge that the ordinance furthered an improper purpose, but rather attacked its lack of specificity, its jurisdictional basis, and the method by which it was enacted. We do not believe that the constitution requires compensation for any temporary infringement of an owner's property rights, no matter how slight, every time a town makes a mistake in construing an enabling statute or in measuring its geographical boundaries.

Id. at 601-02 (footnotes omitted).

The Connecticut Supreme Court noted at footnote 17 that:

> Port Clinton's complaint attacked the ordinance as "a municipal mode of arbitrarily denying reasonable use of property, confiscating the plaintiffs' property, or arbitrary conduct, abuse of authority, interfering with the rights of citizens who wish to make recreational use of the coastal waters and permitting predetermined suppression of property rights." That allegation is simply another way of asserting that the ordinance was vague and that it confiscated Port Clinton's riparian rights. The record does not indicate that Port Clinton has argued that the ordinance constituted some kind of invidious discrimination or promoted the private aims of its promulgators or in any other way exceeded the police

> power to protect and promote the health, safety and general welfare of the public.

Id. at 601-02 n.17.

As the Connecticut Supreme Court correctly recognized, the talismanic invocation of the words "procedural due process" does not transform an otherwise insufficient "taking" claim into a matter of constitutional importance necessary to compel this Court to exercise its judicial discretion to accept the writ of certiorari.

The respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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